

BACKGROUND

In 1998 and 1999, I-Enterprise, through its predecessors-in-interest, invested in two venture capital funds, Draper Fisher Jurvetson Fund V L.P. (“Fund V”) and Draper Fisher Jurvetson Fund VI L.P. (“Fund VI”). (See Third Amended Complaint (“TAC”) ¶¶ 1, 4.) I-Enterprise alleges that it has suffered more than \$40 million in damages as a result of defendants’ fraudulent and negligent misrepresentations, breach of contract, breach of fiduciary duty, state securities law violations, unfair business practices, conversion, and unjust enrichment. (See *id.* ¶¶ 1, 3.)

9 Defendant Draper Fisher Jurvetson Management Company V, LLC (“DFJ-V”) is the
10 general partner of Fund V. (See id. ¶ 5.) Defendant Draper Fisher Jurvetson Management
11 Company VI, LLC (“DFJ-VI”) is the general partner of Fund VI. (See id. ¶ 6.) Defendants
12 Timothy C. Draper (“Draper”), John H.N. Fisher (“Fisher”), and Stephen T. Jurvetson
13 (“Jurvetson”) (collectively, the “individual defendants”) are managing directors of DFJ-V and
14 DFJ-VI. (See id. ¶¶ 7-9.) The individual defendants are also general partners in the
15 Draper Fisher Jurvetson general partnership (“DFJ”). (See id.)

On December 15, 2004, the Court granted in part and denied in part defendants' motion for partial judgment on the pleadings as to I-Enterprise's Second Amended Counterclaim.¹ In particular, the Court found that with limited exceptions, as set forth infra, all of I-Enterprise's claims based on the following allegations were derivative claims that were required to be brought on behalf of Fund V or Fund VI, the partnerships in which I-Enterprise is a limited partner, and could not be brought by I-Enterprise on its own behalf: (1) failure to make the requisite capital contributions to the partnerships; (2) failure to adhere to the investment objectives set forth in the Offering Memoranda; (3) misallocations of profits, losses, and securities; (4) failure to devote appropriate time to management of the funds, and (5) conflict of interest and self-dealing. See Order Granting in Part and

²⁷ ¹ Pursuant to stipulation, the parties were realigned on January 28, 2005. (See
²⁸ Docket No. 191.) I-Enterprise is now the plaintiff; DFJ-V, DFJ-VI, Draper, Fisher, and
Juryetson are now defendants. (See *id.*)

1 Denying in Part Counterdefendants' Motion for Partial Judgment on the Pleadings or, in the
2 Alternative, for Summary Adjudication, filed December 15, 2004, at 3-4, 21 ("December 15
3 Order"). The Court granted defendants' motion for judgment on the pleadings as to all
4 claims based on such allegations, with the exception of I-Enterprise's claims for negligent
5 misrepresentation, fraud, violation of Massachusetts Blue Sky laws, and for an accounting.
6 See id. The Court denied defendants' motion as to claims based on the following
7 allegations: (1) failure to distribute securities to I-Enterprise; and (2) failure to provide notice
8 to I-Enterprise when the individual counterdefendants ceased being active in the
9 management of the funds. See id. at 21.

10 On February 24, 2005, I-Enterprise filed a motion for leave to file a Third Amended
11 Complaint. The proposed amendments fell into two categories. First, I-Enterprise sought
12 to amend its pleading to recharacterize certain of the dismissed derivative claims as
13 individual claims, based on defendants' failure to provide notice to I-Enterprise of
14 defendants' alleged wrongdoing, in violation of the limited partnership agreements.
15 Second, I-Enterprise sought to amend its pleading to allege additional misrepresentations
16 by defendants, which, I-Enterprise contended, first came to light during discovery.

On April 4, 2005, the Court granted the motion; I-Enterprise's Third Amended Complaint was filed that same date. Defendants filed the instant motion on April 25, 2005.²

LEGAL STANDARDS

A. Motion to Dismiss

21 A motion to dismiss under Rule 12(b)(6) cannot be granted unless "it appears
22 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would
23 entitle him to relief." See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal can be
24 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
25 under a cognizable legal theory. See Balistreri v. Pacifica Police Dept. 901 F.2d 696, 699

²⁷ On April 4, 2005, the Court granted defendants' motion to disqualify I-Enterprise's
²⁸ counsel. As a result, the hearing on the instant motion was noticed for hearing July 22,
2005, to allow time for I-Enterprise to obtain new counsel.

1 (9th Cir. 1990).

2 Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider any
 3 material beyond the pleadings. See Hal Roach Studios, Inc. v. Richard Feiner And Co.,
 4 Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Material that is properly submitted as part
 5 of the complaint, however, may be considered. See id. Documents whose contents are
 6 alleged in the complaint, and whose authenticity no party questions, but which are not
 7 physically attached to the pleading, also may be considered. See Branch v. Tunnell, 14
 8 F.3d 449, 454 (9th Cir. 1994). In addition, the Court may consider any document “the
 9 authenticity of which is not contested, and upon which the plaintiff’s complaint necessarily
 10 relies,” regardless of whether the document is referred to in the complaint. See Parrino v.
 11 FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998). Finally, the Court may consider matters that
 12 are subject to judicial notice. See Mack v. South Bay Beer Distributors, Inc., 798 F.2d
 13 1279, 1282 (9th Cir. 1986).

14 In analyzing a motion to dismiss, the Court must accept as true all material
 15 allegations in the complaint, and construe them in the light most favorable to the
 16 nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
 17 The Court may disregard factual allegations if such allegations are contradicted by the facts
 18 established by reference to exhibits attached to the complaint. See Durning v. First Boston
 19 Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Conclusory allegations, unsupported by the
 20 facts alleged, need not be accepted as true. See Holden v. Hagopian, 978 F.2d 1115,
 21 1121 (9th Cir. 1992).

22 **B. Motion to Strike**

23 Rule 12(f) of the Federal Rules of Civil Procedure authorizes the Court to “order
 24 stricken from any pleading any insufficient defense or any redundant, immaterial,
 25 impertinent, or scandalous matter.” See Fed. R. Civ. P. 12(f). “[T]he function of a 12(f)
 26 motion to strike is to avoid the expenditure of time and money that must arise from litigating
 27 spurious issues by dispensing with those issues prior to trial. . . .” Fantasy, Inc. v. Fogerty,
 28 984 F.2d 1524, 1527 (9th Cir. 1993) (citation omitted), rev. on other grounds, 510 U.S. 517

1 (1994).

2 **DISCUSSION**

3 **A. Claims Based on Failure to Notify Limited Partners of “Detrimental Acts”**

4 The limited partnership agreements for Fund V and Fund VI require the General
 5 Partner to provide written notice to the limited partners if any of the individual defendants
 6 do not remain active in the management of the funds or if “the General Partner or any of its
 7 Managing Members has committed a Detrimental Act.” (See TAC ¶ 26; see also Ramani
 8 Decl. Ex. C (Fund V Limited Partnership Agreement) at 25 § 14.9(b) and Ex. C (Fund VI
 9 Limited Partnership Agreement) at 28 § 14.9(b).)³ The limited partnership agreements
 10 further provide for termination of the funds if two-thirds of the limited partners vote to
 11 terminate the partnership within 90 days of receiving such written notice from the General
 12 Partner. (See id.) The limited partnership agreements define “Detrimental Act” as “(i)
 13 actual fraud or willful misconduct which directly causes a material adverse effect to the
 14 Partnership or its assets or (ii) being convicted of a felony or of securities fraud or
 15 embezzlement.” (See id. (Fund V Limited Partnership Agreement) at 13 § 8.4(a) and (Fund
 16 VI Limited Partnership Agreement) at 15 § 8.4(a).)

17 I-Enterprise has amended its complaint to allege that the Funds’ General Partners
 18 breached their duty to provide written notice of the following alleged “Detrimental Acts”:

19 1. Distribution of Cyrus stock to the Fund V General Partner, even though the stock
 20 was not a distributable marketable security of which the General Partner was entitled to
 21 take a share;

22 2. Engaging in conflict of interest and self-dealing transactions, including personal
 23 transactions involving shares of portfolio company stock, misappropriation of partnership
 24 opportunities and assets, and investing in affiliate companies without the requisite consent.

25 3. Failure to dedicate appropriate time to effectively manage the affairs of the
 26 partnership, and agreeing to dedicate 100% of their time to funds other than Funds V and

27
 28 ³ Both Limited Partnership Agreements are attached to the Ramani Declaration as
 Exhibit C.

1 VI barely a year into the ten-year term of Fund VI.

2 4. Failure to make any of the required capital contributions to the funds.

3 5. Instead of returning to the limited partners capital previously reserved for follow-
4 on investments in portfolio companies that had failed, embarking on a “recovery program”
5 to reinvest that money with changed investment objectives and in conflict with investments
6 being made at the same time by Fund VII.

7 6. Failing to follow the valuation procedures required by the Fund V Agreement.

8 (See TAC ¶¶ 150-162.)

9 I-Enterprise alleges that defendants’ failure to give the required written notice of
10 these acts “deprived it of the opportunity in response, among other things (a) to withhold
11 further capital contributions on account of such material contract breaches; (b) to sell its
12 limited partnership interest in Fund V or VI; (c) to seek judicial dissolution of the
13 Partnerships; or (d) to obtain a vote of two-thirds in interest of the limited partners to
14 terminate the Partnerships.” (See TAC ¶ 162.)

15 **1. Direct or Derivative?**

16 Defendants’ first argument for dismissal is that the Court has already held that any
17 claims based on “Detrimental Acts” must be brought as derivative claims and may not be
18 asserted by I-Enterprise individually. As noted, in the Court’s December 15, 2005 order,
19 the Court granted judgment on the pleadings in favor of defendants with respect to
20 I-Enterprise’s claims for damages based on “(1) failure to make the requisite capital
21 contributions to the partnerships, (2) failure to adhere to the investment objectives set forth
22 in the Offering Memoranda, (3) misallocations of profits, losses, and securities, (4) failure to
23 devote appropriate time to management of the funds, and (5) conflict of interest and self-
24 dealing,” on the ground that “[a]ll such claims must be brought as derivative claims and
25 may not be asserted by I-Enterprise individually.” (See December 15 Order at 19-20.) The
26 Court denied judgment on the pleadings, however, with respect to I-Enterprise’s claim that
27 defendants failed to provide the requisite notice that the individual defendants ceased being
28 active in the management of the funds, in violation of § 14.9 of the limited partnership

1 agreements, finding that such allegation stated a direct claim. (See id. at 17-18.)
 2 I-Enterprise's new claims for failure to provide the requisite notice of alleged Detrimental
 3 Acts, in violation of § 14.9 of the limited partnership agreements, similarly state direct, not
 4 derivative, claims, for the reasons set forth in the December 15 Order. (See id. at 10-11,
 5 17-18.)

6 As the Court noted therein, a derivative suit, under California law, "seeks to recover
 7 for the benefit of the corporation and its whole body of shareholders when injury is caused
 8 to the corporation that may not otherwise be redressed because of failure of the
 9 corporation to act." See Jones v. H. F. Ahmanson & Co., 1 Cal. 3d 93, 106 (1969). An
 10 action is derivative "if the gravamen of the complaint is injury to the corporation, or to the
 11 whole body of its stock or property without any severance or distribution among individual
 12 holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its
 13 assets." See id. A general rule is that "a stockholder of a corporation has no personal or
 14 individual right of action against third persons, including the corporation's officers and
 15 directors, for a wrong or injury to the corporation which results in the destruction or
 16 depreciation of the value of his stock, since the wrong thus suffered by the stockholder is
 17 merely incidental to the wrong suffered by the corporation and affects all stockholders
 18 alike." See id. at 107.

19 Here, I-Enterprise does not allege that defendants' Detrimental Acts reduced the
 20 value of the partnerships' assets, and consequently injured I-Enterprise. Such a claim
 21 would be a derivative claim, as the injury to I-Enterprise would be incidental to the injury to
 22 the assets of the partnerships. See id. Rather, I-Enterprise now seeks to recover
 23 damages for defendants' alleged failure to provide contractually-owed notice of their
 24 wrongdoing to I-Enterprise, which prevented it from taking actions to protect its own
 25 interests by (a) withholding further capital contributions; (b) selling its limited partnership
 26 interest in Fund V or VI; (c) seeking judicial dissolution of the Partnerships; or (d) obtaining
 27 a vote of two-thirds in interest of the limited partners to terminate the Partnerships. (See
 28 TAC ¶ 162.) As noted in the December 15 Order, a claim for failure to provide notice to the

1 limited partners is a direct claim. (See December 15 Order at 9-11, 17 (citing Anglo-
 2 American Security Fund, L.P. v. S.R. Global International Fund, L.P., 829 A.2d 143, 150-
 3 154 (Del. Ch. 2003)). In short, a failure to give notice of Detrimental Acts “would injure only
 4 the partners, and not the partnership itself, as the financial condition of the partnership
 5 exists regardless of whether it is reported to the limited partners.” (See December 15
 6 Order at 11 (citing Anglo-American, 829 A.2d at 154)).

7 **2. Damages**

8 Defendants further argue that I-Enterprise’s “failure to notify” claims should be
 9 dismissed because I-Enterprise was not entitled, under the limited partnership agreements,
 10 to unilaterally withdraw from the partnerships and, thus, cannot show that it was damaged
 11 by defendants’ alleged failure to provide notice of Detrimental Acts. Defendants correctly
 12 point out that the partnership agreements preclude limited partners from withdrawing from
 13 the partnership “without the prior written consent of the General Partner and a sixty-six and
 14 two-thirds percent (66-2/3%) in interest of the Limited Partners.” (See Ramani Decl. Ex. C
 15 (Fund V Limited Partnership Agreement) § 7.2 and Ex. C (Fund VI Limited Partnership
 16 Agreement) § 7.2.) Defendants also note, in their reply, that a limited partner who fails to
 17 make any of the contributions required under the partnership agreements is “in default and
 18 the other Limited Partners . . . and the General Partner . . . have the right and option to
 19 acquire the Partnership interest of the defaulting Partner,” (see id. § 4.5(b)), and that the
 20 partnership agreements preclude a limited partner from selling his interest in the
 21 partnerships “without the prior written consent of the General Partner,” (see id. § 9.3.).

22 The limited partners are not entirely powerless to redress wrongdoing by the general
 23 partners, however, as § 14.9 of the partnership agreements provides that upon notice of
 24 Detrimental Acts, the partnerships may be terminated by “the vote of two-thirds (2/3) in
 25 interest of the Limited Partners.” (See id. ¶ 14.9.) Defendants also fail to point to any
 26 provision of the partnership agreements that would preclude I-Enterprise from seeking
 27 judicial dissolution of the funds had I-Enterprise received notice of defendants’ alleged
 28 wrongdoing. As I-Enterprise points out, under California law, any limited partner may seek

1 judicial dissolution of a general partnership if, for example, “the property of the limited
 2 partnership is being misapplied or wasted by the general partners” or “[d]issolution is
 3 reasonably necessary for the protection of the rights or interest of the complaining
 4 partners.” See Cal. Corp. Code § 15682.

5 In short, the gravamen of I-Enterprise’s claims is that defendants’ failure to provide
 6 notice of Detrimental Acts precluded I-Enterprise from taking action to protect its
 7 investment in the funds, and that it suffered damage as a result thereof. As defendants
 8 have not shown, as a matter of law, that there was no action I-Enterprise could have taken
 9 to protect its investment had it received notice of defendants’ alleged wrongdoing, dismissal
 10 is inappropriate.

11 **3. Rule 9(b)**

12 Defendants also argue that I-Enterprise has failed to plead its “failure to provide
 13 notice” claim with the particularity required by Rule 9(b) of the Federal Rules of Civil
 14 Procedure. Rule 9(b) requires averments of fraud to be pleaded with particularity. See
 15 Fed. R. Civ. P. 9(b). Defendants argue that “because [I-Enterprise’s] new claims hinge on
 16 the existence of “Detrimental Acts,” the only type of claims [I-Enterprise] could possibly
 17 bring under this Section would be fraud claims[.]“ (See Motion at 7.)

18 This argument is unpersuasive, for two reasons. First, the partnership agreement
 19 defines “Detrimental Acts” to include “actual fraud or willful misconduct.” (See Ramani
 20 Decl. Ex. C (Fund V Limited Partnership Agreement) § 8.4 and Ex. C (Fund VI Limited
 21 Partnership Agreement) § 8.4.) As “Detrimental Acts” can be proved by demonstrating that
 22 defendants engaged in “willful misconduct,” any claim based on “Detrimental Acts” is not
 23 necessarily a fraud claim. Here, plaintiffs allege defendants engaged in Detrimental Acts
 24 as a result of willful misconduct. (See TAC ¶ 26.)

25 Second, plaintiffs do not allege that defendants’ failure to provide notice of their
 26 wrongful acts was an act of fraud; rather, they contend the failure to provide notice was a
 27 breach of contract and breach of fiduciary duty. (See TAC ¶¶ 26, 87, 186, 200, 256, 270.)

28 Accordingly, Rule 9(b) has no application to the pleading of I-Enterprise’s “failure to

1 provide notice" claims.

2 **4. Conclusion**

3 For the reasons set forth above, the Court will DENY defendants' motion to dismiss
 4 I-Enterprise's claims based on failure to provide notice of Detrimental Acts.

5 **B. Massachusetts Blue Sky Law**

6 I-Enterprise alleges defendants violated the "Massachusetts Blue Sky law"⁴ by
 7 selling interests in the Fund VI limited partnerships by means of various misrepresentations
 8 and omissions contained in the offering memorandum and partnership agreement for Fund
 9 VI. (See TAC ¶ 240-253.) I-Enterprise alleges that it is a Delaware limited liability
 10 company with a place of business in Hingham, Massachusetts, and that its sole member is
 11 a Delaware limited liability company, the members of which are all Massachusetts citizens.
 12 (See id. ¶ 4.) I-Enterprise acknowledges that Fund VI is a California limited partnership
 13 formed pursuant to the terms of the California Revised Limited Partnership Act. (See id.
 14 ¶ 20.) Defendants move to dismiss I-Enterprise's claim for violation of the Massachusetts
 15 Blue Sky law on the ground that the Fund VI limited partners, including I-Enterprise,
 16 specifically agreed that California law would govern the terms of the Fund VI investment,
 17 and that application of Massachusetts law is inconsistent with the public policy of the state
 18 of California.

19 The Fund VI Limited Partnership Agreement expressly provides: "This Agreement
 20 shall be governed by and construed under the laws of the State of California as applied to
 21 agreements among the residents of such state made and to be performed entirely within
 22 such state." (See Ramani Decl. Ex. C (Fund VI Limited Partnership Agreement) § 15.1.) In
 23

24 ⁴ Under the Massachusetts Uniform Securities Act, which I-Enterprise refers to as
 25 the "Massachusetts Blue Sky law," any person who "offers or sells a security by means of
 26 any untrue statement of material fact or any omission to state a material fact necessary in
 27 order to make the statements made, in the light of the circumstances under which they are
 28 made, not misleading . . . is liable to the person buying the security from him, who may sue
 either at law or in equity to recover the consideration paid for the security, together with
 interest at six per cent per year from the date of payment, costs, and reasonable attorneys'
 fees, less the amount of any income received on the security, upon the tender of the
 security." See Mass. Gen. Laws, ch. 110A, § 410(a)(2).

1 a diversity action, the Court, in determining the enforceability of a contractual choice of law
 2 provision, applies the choice of law rules of the forum state. See General Signal Corp. v.
 3 MCI Telecommunications Corp., 66 F.3d 1500, 1505 (9th Cir. 1995). Under California
 4 choice of law rules, courts “must apply the law designated by the contractual provision
 5 unless (1) the chosen state has no substantial relationship to the parties or transaction; or
 6 (2) such application would run contrary to a California public policy or evade a California
 7 statute.” See id. at 1506 (citing Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 466
 8 (1992)).

9 I-Enterprise concedes that defendant DFJ-VI is a California limited liability company,
 10 (see TAC ¶ 6), and that individual defendants Draper, Fisher, and Jurvetson are all
 11 residents of California, (see id. ¶¶ 7-9). Accordingly, the parties’ choice of California law
 12 has a substantial relationship to the parties or transaction.

13 There is no argument that application of California law to the instant dispute would
 14 run contrary to California public policy or evade a California statute. Thus, both parts of the
 15 California test for applying a contractual choice of law provision are satisfied in the instant
 16 action.

17 In addition, the California Supreme Court has held that “[w]hen a rational
 18 businessperson enters into an agreement establishing a transaction or relationship and
 19 provides that disputes arising from the agreement shall be governed by the law of an
 20 identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all
 21 disputes arising out of the transaction or relationship.” See Nedlloyd Lines B.V. v. Superior
Court, 3 Cal. 4th at 469 (emphasis in original). Accordingly, in the absence of any other
 23 contractual provision to the contrary, California law is applicable to the instant dispute, and
 24 I-Enterprise’s claim under Massachusetts law is subject to dismissal.

25 As I-Enterprise points out, however, although the parties agreed, in the Fund VI
 26 Subscription Agreement, that I-Enterprise’s subscription to Fund VI would “be enforced,
 27 governed and construed in all respects in accordance with the laws of the State of
 28 California,” (see Ramani Decl. Ex. B (Fund VI Subscription Agreement) ¶ 6), the parties

1 also agreed: "Notwithstanding any of the representations, warranties, acknowledgments or
 2 agreements made herein by the undersigned, the undersigned does not hereby or in any
 3 other manner waive any rights granted to him or her under federal or state securities laws."
 4 (See id. ¶ 3.)⁵ Read together, the two sections are susceptible of an interpretation under
 5 which California law generally governs, but investors in Fund VI are not precluded from
 6 bringing suit to enforce their rights under any applicable federal or state securities law.⁶

7 The Massachusetts Supreme Court has held that the Massachusetts Blue Sky law
 8 applies where the defendants offer or sell a security in Massachusetts. See Marram v.
 9 Kobrick Offshore Fund, Ltd., 442 Mass. 43, 52 (2004). An offer to sell is deemed to have
 10 been made in Massachusetts when the offer either (1) originates in Massachusetts or (2) is
 11 directed by the seller to a purchaser in Massachusetts. See Mass. Gen. Laws, ch. 110A,
 12 § 414(c). The Fund VI Subscription Agreement and Limited Partnership Agreement each
 13 indicate that Stephen Roy ("Roy"), the purchaser from whom I-Enterprise obtained its
 14 interest, is located in Massachusetts. (See Ramani Decl. Ex. B (Fund VI Subscription
 15 Agreement), signature page, and Ex. C (Fund VI Limited Partnership Agreement),
 16 signature page.)

17 Defendants argue, however, that application of Massachusetts law to the instant
 18 transaction would violate California public policy. As noted above, a contractual choice of
 19 law provision is not enforceable under California choice of law rules if "such application
 20 would run contrary to a California public policy or evade a California statute." See General
 21

22 ⁵ I-Enterprise points out that both California and Massachusetts securities law
 23 include an anti-waiver provision. See Cal. Corp. Code § 25701 ("Any condition, stipulation
 24 or provision purporting to bind any person acquiring any security to waive compliance with
 25 any provision of this law or any rule or order hereunder is void."); see also Mass. Gen.
 Laws, ch. 110A, § 410(g) ("Any condition, stipulation, or provision binding any person
 acquiring any security to waive compliance with any provision of this chapter or any rule or
 order hereunder is void.").

26 ⁶ The Court makes no dispositive finding on this issue, but rather construes the
 27 agreement in the light most favorable to I-Enterprise, as it is required to do in ruling on the
 28 instant motion to dismiss. See, e.g., NL Industries, Inc. v. Kaplan, 792 F.2d at 898 (holding
 court, in analyzing motion to dismiss, must construe allegations in light most favorable to
 nonmoving party).

1 Signal Corp. v. MCI Telecommunications Corp., 66 F.3d at 1505 (citing Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th at 466). Defendants argue that although both California and
 2 Massachusetts securities laws protect investors from those who sell a security by means of
 3 untrue statements of material fact or omissions of material fact, (see Cal. Corp. Code §§
 4 25401, 25501; Mass. Gen. Laws, ch. 110A, § 410(a)(2)), the California Securities Act has a
 5 shorter statute of limitations than the four-year period set forth under the Massachusetts
 6 Blue Sky law. Compare Cal. Corp. Code § 25506 (“no action shall be maintained . . .
 7 unless brought before the expiration of four years after the act or transaction constituting
 8 the violation or the expiration of one year after the discovery by the plaintiff of the facts
 9 constituting the violation, whichever shall first expire”) with Mass. Gen. Laws, ch. 110A, §
 10 410(e) (“No person may sue . . . more than four years after the discovery by the person
 11 bringing the action of a violation”). Defendants argue that California public policy precludes
 12 enforcement of claims under another state law that would be time-barred if brought under
 13 California law.

14 The Ninth Circuit has held that “California’s interest in applying its own law is
 15 strongest when its statute of limitations is shorter than that of the foreign state, because a
 16 “state has a substantial interest in preventing the prosecution in its courts of claims which it
 17 deems to be ‘stale.’” Deutsch v. Turner Corp., 324 F.3d 692, 717 (9th Cir. 2003) (citing
 18 Restatement (Second) of Conflict of Laws § 142, cmt. f (1988)). There is no showing,
 19 however, that I-Enterprise’s claims would be time-barred if brought under California law.
 20 As I-Enterprise notes, the complaint in the instant action was filed April 11, 2003, within four
 21 years of the date Roy entered into the Fund VI Subscription Agreement and Limited
 22 Partnership Agreement. (See Ramani Decl. Ex. B (Fund VI Subscription Agreement),
 23 entered into July 31, 1999, and Ex. C (Fund VI Limited Partnership Agreement), entered
 24 into August 13, 1999.) As noted, a claim for violation of the California Securities Act must
 25 be “brought before the expiration of four years after the act or transaction constituting the
 26 violation or the expiration of one year after the discovery by the plaintiff of the facts
 27 constituting the violation, whichever shall first expire.” See Cal. Corp. Code § 25506.

1 Defendants have made no showing that, as a matter of law, I-Enterprise discovered the
 2 alleged violations more than one year before the complaint was filed. Thus, defendants
 3 have not shown that application of Massachusetts law would violate California public policy.

4 Accordingly, because the Fund VI Subscription Agreement may have reserved to
 5 I-Enterprise the right to bring suit under any applicable state securities law, and there has
 6 been no showing that application of Massachusetts law would violate California public
 7 policy, the Court will DENY defendant's motion to dismiss I-Enterprise's claim for violation
 8 of the Massachusetts Blue Sky law.

9 **C. Negligent Misrepresentation**

10 I-Enterprise asserts claims for negligent misrepresentation based on the allegation
 11 that defendants made various material misrepresentations and/or failed to disclose material
 12 information to I-Enterprise in connection with the marketing of Funds V and VI. (See TAC
 13 ¶¶ 173, 228.) Defendants now move to dismiss I-Enterprise's claims for negligent
 14 misrepresentation based on some, but not all, of the alleged misrepresentations.

15 The elements of negligent misrepresentation are: (1) "misrepresentation (false
 16 representation, concealment, or nondisclosure)"; (2) the plaintiff's justifiable reliance on the
 17 misrepresentation; and (3) damages. See Small v. Fritz Companies, Inc., 30 Cal. 4th 167,
 18 173 (2003). "The tort of negligent misrepresentation does not require scienter or intent to
 19 defraud." Id. Negligent misrepresentation encompasses "the assertion, as a fact, of that
 20 which is not true, by one who has no reasonable ground for believing it to be true" and "the
 21 positive assertion, in a manner not warranted by the information of the person making it, of
 22 that which is not true, although he believes it to be true." See id. (citing Cal. Civ. Code
 23 §§ 1710(2) and 1572(2)).

24 In addition, "[t]o state a cause of action for negligent misrepresentation, plaintiff must
 25 allege facts establishing that the defendant owed him a duty to communicate accurate
 26 information." See Friedman v. Merck & Co., 107 Cal. App. 4th 454, 477 (2003). "California
 27 courts have recognized a cause of action for negligent misrepresentation, i.e., a duty to
 28 communicate accurate information . . . where information is conveyed in a commercial

1 setting for a business purpose." See id. In addition, "a seller of a limited partnership
 2 interest owes a fiduciary duty [to disclose all material facts] to the prospective purchaser of
 3 such an interest." See Eisenbaum v. Western Energy Resources, Inc., 218 Cal. App. 3d
 4 314, 322, 324 (1990). Further, where "one is under no duty to speak, but yet undertakes to
 5 do so, either voluntarily or in response to inquiry, he must make a full and fair disclosure
 6 and conceal no facts within his knowledge which materially qualify those stated[.]" See
 7 Kuhn v. Gottfried, 103 Cal. App. 2d 80, 86 (1951).

8 Accordingly, I-Enterprise has adequately alleged that defendants owed I-Enterprise
 9 "a duty to communicate accurate information" about the Funds. See Friedman v. Merck &
 10 Co., 107 Cal. App. 4th at 477.

11 **1. General Market Trends**

12 Defendants move to dismiss I-Enterprise's negligent misrepresentation claims, to the
 13 extent such claims are based on failure to disclose general market trends that might affect
 14 anticipated future performance and investment strategies, on the ground defendants had
 15 no duty to disclose such trends. In response, I-Enterprise contends that it "does not seek
 16 to recover for speculative statements Defendants might have made about future market
 17 performances or future market changes," but rather alleges that defendants made
 18 misrepresentations about "their place in the venture capital market." (See Opp. at 19-20.)

19 Both parties rely on allegations set forth in paragraphs 77 through 81 of the Third
 20 Amended Complaint. In particular, plaintiffs allege that defendants made the following
 21 misrepresentations in the Fund V and Fund VI Offering Memoranda:

22 78. For example, contrary to the representations of the Individual Defendants
 23 that they filled an industry "void," that early stage investing was an
 24 "underserved" niche, that there were only a handful of early stage venture
 25 funds, that they rarely encountered other such funds in head-to-head
 26 competition, that they had strong pricing leverage when they made initial
 27 investments, and that the larger size of Fund VI was necessary in order to
 28 maintain large early ownership positions through follow-on rounds, in fact, the
 venture capital market had experienced explosive growth with a dramatic
 increase in the number of venture capital firms at all stages, there were
 historically high levels of capital available in the market, DFJ faced intense
 competition from other funds, and in order to participate in deals they were
 having to write much bigger checks and make much larger initial investments
 than in the past.

1 79. Contrary to the representations of the Individual Defendants that their
 2 positioning enabled them to get favorable terms for follow-on investments
 3 from “mainstream” venture firms that have to compete with one another under
 4 “pressure to invest the significant amount of capital they manage,” in fact,
 5 DFJ was itself transitioning to become a “mainstream” firm, and the Individual
 6 Defendants were under significant pressure to invest the ever-increasing
 7 amounts of capital they were raising.
 8

9 80. Contrary to the representations of the Individual Defendants that they
 10 would invest small amounts in many start-up and “true ‘seed’ deals,” in fact,
 11 the large size of Funds V and VI and the small number of experienced
 12 investment professionals who would invest them created a structural inability
 13 to make and closely manage the small investments start-ups and true seed
 14 deals require.

15 (See TAC ¶¶ 78-80.)

16 Defendants argue they had no duty to disclose “anticipated market performance or
 17 possible market changes.” (See Motion at 13.) As an initial matter, the Court notes that
 18 defendants rely on federal case law interpreting federal securities laws. Such reliance on
 19 federal law has been held inappropriate, however, because, although “[f]ederal precedent
 20 may be appropriate in the absence of existing state law on an issue, . . . California has an
 21 existing body of law on the tort of negligent misrepresentation.” See Anderson v. Deloitte &
Touche LLP, 56 Cal. App. 4th 1468, 1476 n.4 (1997). Defendants fail to address whether
 22 any such duty to disclose exists under California law, and, for that reason alone, are not
 23 entitled to dismissal. In addition, contrary to defendants’ assertion, the above-cited
 24 paragraphs do not allege a failure to disclose anticipated market performance or possible
 25 market changes. Rather, I-Enterprise alleges defendants made affirmative misstatements
 26 in the Offering Memoranda about their currently-existing structure and position in the
 27 market.

28 Relying on Glen Holly Entertainment Inc. v. Tektronix Inc., 352 F.3d 367 (9th Cir.
 29 2003), defendants further contend the challenged statements are non-actionable “puffery.”
 30 In Glen Holly, the Ninth Circuit held three statements “generally describing the ‘high priority’
 31 [the defendant] placed on product development and alluding to marketing efforts” could not
 32 be the basis of a claim for negligent misrepresentation because “[t]he statements were
 33 generalized, vague and unspecific assertions, constituting mere ‘puffery’ upon which a

1 reasonable consumer could not rely." See id. at 379. Here, the Court cannot say as a
 2 matter of law that the challenged statements are mere puffery. I-Enterprise alleges that
 3 defendants misrepresented their existing position in the market in specific ways, and in
 4 particular, that defendants advertised Funds V and VI as two of the few venture funds
 5 capable of investing in early stage companies, when in fact there were many such funds
 6 already in existence and, further, Funds V and VI were structurally incapable, due to their
 7 large size, of managing the small investments early stage companies require. (See TAC
 8 ¶¶ 78-80.) The Court cannot say as a matter of law that such statements were so
 9 generalized, vague and unspecific that a reasonable investor could not rely on them. See
 10 Anderson v. Deloitte & Touche LLP, 56 Cal. App. 4th at 1479 (holding that in all but rare
 11 instances, "whether the plaintiff's reliance is reasonable is a question of fact").

12 Accordingly, the Court will DENY defendants' motion to dismiss the negligent
 13 misrepresentation claim to the extent it is based on misrepresentations alleged in ¶¶ 77-81
 14 of the Third Amended Complaint.

15 **2. Investment Objectives**

16 Defendants move to dismiss, as time-barred, I-Enterprise's claim that defendants
 17 misrepresented, in the Offering Memoranda, the Funds' investment objectives. Defendants
 18 rely on the three-year statute of limitations for fraud actions set forth in California Code of
 19 Civil Procedure § 338(d), under which a fraud claim "is not to be deemed to have accrued
 20 until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."
 21 See Cal. Code Civ. Proc. § 338(d). According to defendants, plaintiffs have conceded that
 22 they received the Offering Memorandum for Fund V on June 26, 1998, and for Fund VI in
 23 July 1999, and that both dates are more than three years before the instant action was filed
 24 on April 11, 2003. (See TAC ¶¶ 49, 55.) Defendants further contend I-Enterprise has not
 25 alleged facts sufficient to demonstrate that their claims based on misrepresentation of
 26 investment objectives are timely.

27 The statute of limitations is an affirmative defense to be raised by the defendants,
 28 however, not a pleading requirement that must be satisfied by the plaintiff. See Fed. R.

1 Civ. P. 8(c); see also California Sansome Co. v. U.S. Gypsum, 55 F.3d 1402 (9th Cir.
 2 1995) (“A defendant raising the statute of limitations as an affirmative defense has the
 3 burden of proving the action is time barred.”) A statute of limitations defense is properly
 4 raised in a motion to dismiss only “if the running of the statute is apparent from the face of
 5 the complaint.” See Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 484 n.1 (9th
 6 Cir. 1987); see also Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1207 (9th Cir.
 7 1995) (“[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff
 8 can prove no set of facts that would establish the timeliness of the claim.”). Only if the
 9 complaint on its face demonstrates the cause of action is time-barred, and the plaintiff
 10 relies on the discovery rule to show timeliness, does the plaintiff have the burden to
 11 “specifically plead facts which show (1) the time and manner of discovery and (2) the
 12 inability to have made earlier discovery despite reasonable diligence.” See CAMSI IV v.
 13 Hunter Technology Corp., 230 Cal. App. 3d 1525, 1536 (1991); see also California Gypsum
 14 Co. v. U.S. Gypsum, 55 F.3d 1402 (9th Cir. 1995) (citing CAMSI IV). In cases involving a
 15 fiduciary relationship between the parties, however, “the usual duty of diligence to discover
 16 facts does not exist” and “the limitations period does not begin to run until plaintiff actually
 17 discovers the facts constituting the cause of action, even though the means for obtaining
 18 the information are available.” See Eisenbaum, 218 Cal. App. 3d at 325.

19 Here, the complaint on its face does not demonstrate plaintiff’s claim is time-barred.
 20 Plaintiff’s receipt of the Offering Memoranda provides no basis for inferring that plaintiff
 21 knew, as of that date, that the representations contained therein were false.⁷ Defendants
 22 point to no allegation in the complaint suggesting that plaintiff was aware more than three
 23 years before the instant action was filed that the representations contained in the Offering
 24 Memoranda were false. Because the complaint, on its face, does not show the cause of
 25 action to be time-barred, the Court will DENY defendants’ motion to dismiss plaintiff’s claim
 26

27 ⁷ Because fraud, by its very nature, is predicated on a lack of knowledge of the
 28 wrongful conduct at the time that conduct is committed, § 338(d), unlike many statutes of
 limitation, does not provide for accrual at the time of an event other than discovery.

1 for negligent misrepresentation, to the extent such claim is based on misrepresentation of
 2 investment objectives in the Offering Memoranda.

3 **3. Failure to Devote Appropriate Time to Managing Funds**

4 Defendants move to dismiss I-Enterprise's negligent misrepresentation claim to the
 5 extent such claim is based on misrepresentations about the amount of time defendants
 6 promised to devote to the management of Funds V and VI. I-Enterprise alleges the Fund V
 7 and VI Limited Partnership Agreements provide that each individual defendant would
 8 "devote so much of his time to the conduct of the affairs of the Partnership and the General
 9 Partner as is appropriate in his judgment to manage effectively the affairs of the
 10 Partnership." (See TAC ¶ 137.) In fact, I-Enterprise alleges, the individual defendants
 11 "have failed to dedicate appropriate time to Fund V and Fund VI and have instead pursued
 12 other interests to the detriment of I-Enterprise." (See TAC ¶ 140.) I-Enterprise alleges
 13 that, in addition to Funds V and VI, the individual defendants marketed and promoted Fund
 14 VII, a \$640 million fund, raised another \$690 million for a global technology fund, acted as
 15 sub-adviser to a \$330 million publicly traded venture fund, and were promoting seven or
 16 more regional funds of \$100 million or more each, which resulted in the individual
 17 defendants' failure to dedicate appropriate time to Funds V and VI. (See id. ¶ 142.)
 18 I-Enterprise further alleges that defendant Fisher relocated to London for a substantial
 19 period of time to organize the global technology fund, and did not dedicate appropriate time
 20 to managing Funds V and VI. (See id. ¶ 144.) Moreover, defendant Draper, according to
 21 I-Enterprise, spent a substantial portion of his time campaigning for a ballot initiative in
 22 California in 2000, rather than dedicating appropriate time to managing Funds V and VI.
 23 (See id. ¶ 145.)

24 Defendants argue that the very terms of the limited partnership agreements on
 25 which I-Enterprise rely contradict I-Enterprise's claim of misrepresentation.⁸ The Fund V
 26

27 ⁸ Documents whose contents are alleged in the complaint, and whose authenticity
 28 no party questions, but which are not physically attached to the pleading, may be
 considered in ruling on a motion to dismiss. See Branch v. Tunnell, 14 F.3d at 454.

1 and Fund VI Limited Partnership Agreements both state:

2 Each Managing Member of the General Partner hereby agrees that, so long
 3 as he remains a Managing Member of the General Partner, he shall devote
 4 so much of his time to the conduct of the affairs of the Partnership and the
 5 General Partner as is appropriate in his judgment to manage effectively the
 6 affairs of the Partnership. The Limited Partners acknowledge that each
 7 managing member of the General Partner has existing commitments to other
 8 entities, that such commitments will continue during the term of the
 9 Partnership and that additional commitments may be added during the term
 10 of the Partnership.

11 (See Ramani Decl. Ex. C (Fund V Limited Partnership Agreement) § 8.3, and Ex. C (Fund
 12 VI Limited Partnership Agreement) § 8.3.)

13 In the contractual language set forth above, defendants are expressly given the
 14 authority to determine how much time is necessary to manage the funds effectively.
 15 I-Enterprise does not allege that defendants, in fact, devoted no time to that endeavor.
 16 Rather, I-Enterprise alleges that defendants failed to disclose other, then-existing
 17 commitments. The limited partnership agreements specifically disclose, however, the
 18 existence at that time of “commitments to other entities.” (See *id.*) The failure to specify
 19 the particular commitments does not render those statements false or misleading.

20 Additionally, as to Fund VI, I-Enterprise alleges that DFJ-VI and the individual
 21 defendants failed to disclose the existence and terms of a “side agreement entered into by
 22 them prior to the closing of Fund VI,” by which the individual defendants were required to
 23 devote only half their time to the business of all DFJ funds combined, “and guaranteed
 24 them each personally millions of Fund VI management fees even if they devoted no time to
 25 Fund VI at all.” (See TAC ¶ 170.) There is nothing inconsistent, however, between the
 26 statements made in the Fund VI Limited Partnership Agreement and the alleged “side
 27 agreement.” Under such circumstances, I-Enterprise has not alleged falsity of the above-
 28 quoted statement in the Fund VI Limited Partnership Agreement.⁹

29
 30 ⁹ The Court expresses no opinion as to whether defendants, as I-Enterprise argues,
 31 could have breached the implied covenant of good faith and fair dealing by failing to devote
 32 an objectively adequate amount of time to managing the Funds. The cause of action at
 33 issue is negligent misrepresentation, which requires a false representation or omission.
 34 See Small v. Fritz Companies, Inc., 30 Cal. 4th at 173.

1 Accordingly, defendants' motion to dismiss I-Enterprise's negligent
 2 misrepresentation claim to the extent such claim is based on misrepresentations about the
 3 amount of time defendants promised to devote to the management of Funds V and VI will
 4 be GRANTED.

5 **4. Failure to Disclose "Inter-Fund Loans or Retention of Directed
 6 Shares"**

7 Defendants argue that I-Enterprise's allegations that defendants failed to disclose
 8 "inter-fund loans or retention of directed shares" fails to state a claim for negligent
 9 misrepresentation because I-Enterprise has not alleged any damages arising from the
 10 alleged nondisclosure. With respect to such nondisclosure, I-Enterprise alleges the
 11 following:

12 164. The Fund VI General Partner and the Individual Defendants failed to
 13 disclose that the Fund V General Partner had diverted Fund V monies for
 14 non-Partnership purposes, including that the Fund V General Partner in 1998
 15 had used \$375,000 of Fund V monies to purchase shares of Wit Capital for
 16 the Fund V side-by-side fund and in July 1999 had used \$1.59 million of Fund
 17 V monies to buy shares of Digital Impact for Fund IV.

18 165. The Fund VI General Partner and the Individual Defendants failed to
 19 disclose that the General Partners of prior DFJ funds and the Individual
 20 Defendants had misappropriated, and intended to continue to misappropriate,
 21 compensation and benefits, including directed shares and option grants,
 22 received on account of board memberships in prior fund portfolio companies
 23 that should have been used to reduce management fees under those funds'
 24 Agreements.

25 (See TAC ¶ 164-165.) Defendants argue that such allegations amount to a failure "to
 26 disclose an accounting technicality." (See Motion at 19.) Defendants further argue that
 27 I-Enterprise fails to allege that any of the loans was not repaid in full or that the accountants
 for Fund V or Fund VI determined that the loans should have been disclosed to the limited
 partners. (See id.) I-Enterprise fails to address this portion of defendants' motion in its
 opposition and, thus, effectively concedes that it is not pursuing a negligent
 misrepresentation claim based on paragraphs 164 and 165 of the Third Amended
 Complaint.

28 Accordingly, the Court will GRANT defendants' motion to dismiss I-Enterprise's

1 negligent misrepresentation claim to the extent such claim is based on the nondisclosures
2 alleged in paragraphs 164 and 165 of the Third Amended Complaint.

5. Failure to Disclose Information About Management Fees

4 Defendants move to dismiss I-Enterprise’s negligent misrepresentation claim to the
5 extent such claim is based on nondisclosure of information about management fees, on the
6 ground the calculation of management fees was disclosed in the limited partnership
7 agreements, and defendants had no duty to disclose any more than they did. In
8 I-Enterprise’s opposition, it states that its “allegations with respect to management fees do
9 not state a separate claim.” (See Opp. at 19 n.10.) As I-Enterprise does not assert a
10 negligent misrepresentation claim based on nondisclosure of information about
11 management fees, defendants’ motion to dismiss such claim will be DENIED as MOOT.

C. Relief Based on Violation of California Unfair Business Practices Act

13 Defendants move to strike I-Enterprise’s prayer for rescission of its investment in
14 Fund VI as a remedy for violation of the California Unfair Business Practices Act.
15 Defendants argue that the Court has already dismissed with prejudice I-Enterprise’s claim
16 for violation of that Act. In its opposition, I-Enterprise states that the request for relief was
17 inadvertent and that it does not oppose defendants’ motion to strike. (See Opp. at 23
18 n.14.)

19 Accordingly, the Court will GRANT defendants' motion to strike I-Enterprise's prayer
20 for relief for violations of the California Unfair Business Practices Act.

CONCLUSION

22 || For the reasons set forth above,

23 1. Defendants' motion to dismiss is hereby GRANTED in part and DENIED in part,
24 as follows:

25 a. Defendants' motion to dismiss I-Enterprise's negligent misrepresentation
26 claim to the extent such claim is based on misrepresentations about the amount of time
27 defendants promised to devote to the management of Funds V and VI is hereby
28 GRANTED.

1 b. Defendants' motion to dismiss I-Enterprise's negligent misrepresentation
2 claim to the extent such claim is based on the nondisclosures alleged in paragraphs 164
3 and 165 of the Third Amended Complaint is hereby GRANTED.

4 c. The remainder of defendants' motion to dismiss is DENIED.

5 2. Defendants' motion to strike I-Enterprise's prayer for relief for violations of the
6 California Unfair Business Practices Act is hereby GRANTED.

7 This order terminates Docket No. 329.

8 **IT IS SO ORDERED.**

9 Dated: July 15, 2005

/s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

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